also that no license was obtained by Wilhelm von Opel to make a gift of foreign exchange to his son, then the transaction would be void whether or not it was sham or whether it was intended as a bona fide gift? A. Yes.

Q. Assume that there was no license. Then, under any hypothesis, as soon as the instrument was signed in November it was void; is that correct? A. Yes.

The Court: I am a little confused on this October
2002 5 date, as between that and October 17.

By the Court:

Q. Would it still be void if executed on the 5th? A. Provided that the object of the gift was foreign exchange or foreign securities. That was Mr. Burling's assumption.

Q. I would like you to make this assumption now. Assume that this is a perfectly bona fide transaction on October 5. A. Yes.

Q. Would that be valid? A. It would be valid, because the object of the gift was German securities, and German securities were not subject at that time to foreign exchange regulations. Mr. Burling made the assumption that they had been changed into foreign securities or foreign currency.

The Court: I understand that.

Mr. Burling: The relevance of my line of inquiry, if Your Honor please, is that the testimony has been that on October 17 the 600 Opel shares were converted—

The Court: I understand that. I had not gotten clearly in my mind that up until October 17 these were German securities.

By the Court:

Q. Being German securities, their location did not
2003 make any difference? He could still transfer them?

A. He could still transfer them. It was much later—

Q. They were in Reichsmarks, anyway? A. Yes.

The Court: All right.

The Witness: It was only in 1938 that the transfer of German securities to a foreign residence was subject to this section.

The Court: That clears up what I had in mind. You go ahead.

By Mr. Burling:

Q. Now, whether or not the gift agreement was signed in October or November, if it was a sham it did not operate to pass title; is that correct? A. Yes.

Q. And assuming, on the contrary, that it was not signed until November, then it would not operate to pass title, either, under the assumptions that I have given you? A. Yes.

Q. Because in November the object of the gift had been converted into foreign exchange? A. Yes.

Q. Now, for the rest of your testimony, Miss Schoch, I ask you to assume that the gift was not a sham but was intended by the parties as a bona fide gift. Now, first assume also that it was executed on October 5 and, leaving a reservation which I will come to in a moment, is it correct that you would believe, by examining the document, that if it was in fact executed on that date and was intended as a bona fide gift agreement, it would act to pass title from Wilhelm and Marta von Opel to Fritz von Opel of 600 shares of Opel stock? A. Yes, I would come to that conclusion, with a reservation.

Q. Now, will you explain what the reservation is? A. The reservation is the following. The agreement provides that the usufruct in the shares is not assigned to Fritz von Opel. It remains with Wilhelm von Opel and his wife. This, it seems to me, points to an intention of the parties to establish a usufruct in the shares in and by this agreement.

Q. That is, immediately? Is that right? A. Yes. From the wording of the agreement, that is the way I interpret it.

Mr. Boland: Your Honor, again I have got to bring up this problem. Are you interpreting this on the basis of cases in Germany or are you interpreting this on the basis of your experience, Miss Schoch?

Mr. Burling: Just a moment. If there is an objection, it should be addressed to His Honor. You are not
2005 examining her.

Mr. Boland: Your Honor, I address the objection to you.

The Court: As I understand it, if she has had experience with this and studied the law with relation to usufruct and compared it with the law of other nations, which means, evidently, that she has given it a very careful study, her interpretation of it would be permissible, I should think.

Mr. Boland: Well, I did not gather, from her qualifications specifically, that in her studies of comparative and international law she specifically took usufruct.

The Court: I asked her that.

The Witness: That was part of my studies. I did not specialize in the subject of usufruct.

Mr. Boland: I did not gather that that was her main effort.

Mr. Burling: I did not hear Mr. Kronstein say that he was a specialist in usufruct problems, nor is there a lawyer alive who is.

The Court: I think you may develop on cross-examination as to the weight of it, but I think I will permit her to answer.

Mr. Burling: I do not mean to argue after your Honor's ruling. My particular purpose in offering this is in direct rebuttal to Professor Kronstein's construction. He testi-

fied at some length as to his hypothesis of how he would read this.

2006 The Court: I understood that.

By Mr. Burling:

Q. Will you proceed, Miss Schoch? A. As I said, the language of the document is in present terms, and my first reaction, seeing nothing but the document—

Q. I am asking you to assume nothing beyond what I have already given you. A. —that the parties intended to establish a usufruct in the shares then and there.

Now, of course, as has been pointed out, there is no provision of reassignment of possession, so that in the absence of this technical requirement of German law, no usufruct was established by this instrument.

The question then arises—and that is the reservation I wanted to make—whether the usufruct did not constitute such an essential part of the gift that, due to the failure of the usufruct, the entire gift would fail.

Q. Will you explain why the entire gift might fail if the usufruct failed? Will you state what section of the German Code you have reference to? A. Under section 139 of the German Civil Code, a transaction is void if an essential part of the transaction is void and if, without that essential part, the entire transaction could not have been made.

2007 It reads:

"Where a part of a legal transaction is void, the entire transaction is void unless it can be assumed that it would have been made without the void part."

Q. So that if you add to the assumptions I have previously given you the assumption that Wilhelm von Opel insisted upon the usufruct provisions, then, as a matter of German law, if the usufruct failed, the entire gift would fail and title would remain in Wilhelm von Opel; is that correct? A. Yes.

Q. And that is the result you come to if you had no assistance other than the four corners of the instrument itself plus the assumptions I have already stated? A. Yes.

Q. Now, you have used the word "usufruct." In German the word used in the instrument is "niessbrauch," is it not? A. Yes.

Q. Do you have any difficulty in translating the word "niessbrauch" into English? A. No, I have not.

Q. Have you examined any dictionaries or lexicons of German and English dictionaries? A. Well, I have examined the standard German-English and English-German dictionaries, and they translate "niessbrauch" by "usufruct," and vice versa.

2008 Q. That is, the dictionaries indicate that the proper translation of the word "niessbrauch" is the word "usufruct"; is that correct? A. Yes. One or two of them also add the word "use."

Q. Now, did you hear Professor Kronstein refer to an article in the Columbia Law Review by a Professor Nussbaum? A. Yes, I remember that.

Q. Have you examined that article at my request? A. Yes, I have.

Q. Does that article contain a translation of the German word "niessbrauch"? A. No, it does not.

Q. Does it use the word "usufruct"? A. Yes, and in passing, I would say.

Q. Does it refer to the German concept of usufruct? A. No, it does not.

Q. I see. Now, are there any standard English language translations of the German Civil Code? A. There are two translations of the German Civil Code; one by Loewy and another by a man named Wang.

Q. Now, how do these two standard translations deal with the word "niessbrauch"? A. They use the term "usufruct."

Q. Now, you heard Dr. Kronstein testify, did you not, concerning the origins of the German law? A. Yes.

2009 Q. And do you not agree with him that there are many elements of the German law which are derived from Germanic law and not the Roman law? A. Speaking about the present day of the German Civil Code and the other German Code, yes.

Q. I address your attention specifically to the problem of the use of usufruct. Can you state where that concept came from in the present German law? Where is it derived from? A. In my opinion, the concept of usufruct in the present German law is derived from and based upon the Roman concept of usufruct.

Q. Do you think this is a matter which is open to doubt or is it a matter that you have a very clear and fixed opinion on?

Mr. Boland: I object, Your Honor. I do not see what Roman law has to do with the problem before the Court.

Mr. Burling: I am not going on more than a few more questions.

The Court: Very well.

Mr. Burling: I want to bring out that the present correct definition of the term "niessbrauch" is contained in the Justinian Code, if Your Honor please, to cast light on what the correct interpretation of the concept is. I

2010 can do it in just a moment, if Your Honor will bear with me.

By Mr. Burling:

Q. Will you answer the question, please? Do you recall the question?

The Court: The question was whether there is any doubt about it. I do not have that before me. That may be objectionable.

Mr. Burling: I will withdraw the question.

By Mr. Burling:

Q. Did you hear Dr. Kronstein refer to his teacher, Martin Wolff? A. Yes, I did.

Q. Who is Wolff? A. Martin Wolff was a professor in the law faculty of Berlin. He was one of the leading authorities in Germany, and he was the author of a textbook of high standing on the German law.

Q. Would it be correct to say that Wolff occupied a position as a textbook writer in German law comparable to that of Wigmore or Williston in American law? A. Yes, I would say so.

Q. Have you examined his textbook with respect to what he says about the concept of usufruct? A. Yes, I have, and I find that--

Q. Have you brought with you this volume? A.
2011 I have the volume with me, and I find that Martin Wolff explains that niessbrauch—

Q. Will you examine, I think it is page 343, and state whether I am correctly translating into English?

"Niessbrauch is a right in rem to use a piece of property in every respect, without, however, having the right to transfer, dispose, or destroy the substance"?

A. Yes. That is a translation of his first paragraph under the heading of "Usufruct."

Q. Now, will you look further and state whether I am correctly translating as follows:

"The modern law of niessbrauch is essentially formed after the pattern of the Roman and civil law. The concept of niessbrauch is entirely Roman. The definition given above corresponds to that of Paulus,"

And then there is a phrase in Latin which we will furnish the reporter:

"Usufructus est ius alienibus rebus utendi fruendi salva rerum substantia"?

A. Yes.

Q. To whom is the Latin attributed by Martin Wolff? A. To the Roman Jurist Paul, or Paulus, and the reference is to the digests which form part of the Justinian Code.

Q. Are you able to translate the Latin which I
2012 just read? A. Well, yes.

Q. Will you do so? A. It says, "Usufruct is the right to use and enjoy property owned by another, without, however, impairing its substance."

Q. Now, do you agree with Wolff that in German law a usufruct or niessbrauch is always a right in rem? A. Yes.

Q. Is there any such thing, as a matter of technical German law, as an in personam niessbrauch? A. No.

Q. Now, would you state whether it is your opinion that any trained German lawyer knows that a usufruct is a right in rem? A. That is my opinion.

Q. Would you state whether, in your opinion, a trained, experienced German lawyer using the word 'usufruct" would intend to refer to a right in rem?

Mr. Boland: Before she answers that, same objection.

The Court: Well, I think that is getting a little too far. I will sustain the objection.

Mr. Burling: I will withdraw the question.

By Mr. Burling:

Q. Would it be possible to have an in personam right or claim to enable someone else to create a usufruct in
2013 the future? A. Oh, yes, that is entirely possible.

Q. Is a right properly called a usufruct? A. No. Such a right is a claim for the creation of a usufruct.

Q. Now, you have taught comparative law, have you not? A. Yes.

Q. I want to ask you a question on comparative law. Would the analogy between a right in the future to require

someone to create a usufruct and a usufruct be equivalent to the right in the future to contract a marriage and a present marriage? A. Well, yes. The one is a marriage and the other is—

Q. A future contract to marry? A. Yes. That is a parallel, except, of course, when it comes to specific performance.

Q. Well, with the exception of that, there is as much difference between an agreement and a marriage as there is between the right to call upon someone in the future to create a usufruct and a usufruct itself; is that right? A. Yes.

Q. Now, I want to ask you another question on comparative law. Are you familiar with the fact that in our law here the courts employ what are called canons of construction? A. Yes.

2014 Q. Are there any canons or rules of construction which are employed in German courts? A. Yes.

Q. Now, with respect to the specific question of the construction of a written instrument, can you state whether you are familiar with the kinds of construction employed in German courts? A. Yes, I think I am.

Q. Are they approximately similar to or are they very different from the rules of construction which an American court would employ? A. I would say that they are not basically different.

By the Court:

Q. Not what? A. Not basically different.

By Mr. Burling:

Q. Is there any rule of construction which as a matter of law a German court would employ in construing a written instrument with respect to what the words of the instrument are? A. Well, I think my friend Kronstein has

explained in his testimony that a court would first use the so-called objective test—that is, it would look to what the parties say and it would look to the natural, accepted, customary meaning of words, and it would look to the
2015 technical meaning of technical expressions.

Q. Now, will you look at Plaintiff's Exhibit 5 once more and state whether the parties say they intend to create a usufruct to be enjoyed by Wilhelm and Marta von Opel or whether they intend to create a claim under which at some point in the future Wilhelm and Marta von Opel might require Fritz von Opel to set up a usufruct? A. The parties say that the usufruct is not assigned, but that it remains with the Opel parents. That to me expresses an intention to establish a usufruct right then and there.

Q. As a matter of German law, are the words relating to usufruct ambiguous or unambiguous? A. The words of this instrument?

Q. Yes. A. I think they are unambiguous.

Q. Again assume that there is no circumstances or showing that this is a sham transaction. Assume it is bona fide. Is there any word or words in the instrument itself which would require or justify a German court in going beyond the words contained in the instrument and looking elsewhere for assistance in construing it? A. I did not quite understand your question, sir.

Q Again assuming for the moment that this gift agreement is bona fide, that the parties intended to make
2016 a gift on October 5, 1931, is there any word or words employed in the instrument itself which create any ambiguity or doubt sufficient to justify a German court in going outside of the instrument in order to construe it? A. I don't think so.

Q. Are you aware of any different rule in the German court than the rule which this Court would apply in determining whether to look beyond the four corners of a written instrument in construing it? A. No. I think the Court here would apply the same criterion.

Q. And will you state what the plain and unambiguous language of the instrument is with relation to the usufruct? A. In my opinion, the plain expression of the instrument is that a usufruct is to remain with the Opel parents.

Q. And that is a right in rem? A. That would be a right in rem.

Q. And yet there is no redelivery? A. No. Therefore, the right in rem has not come into being in this instrument.

Q. If I told you as a hypothesis that the instrument was prepared in about a half an hour, under conditions of great haste and in a hectic atmosphere, would you assume from the instrument that a usufruct was intended or would you assume that some other result was intended?

2017 A. I would assume that a usufruct was intended, but that due to haste, the provision concerning the reassignment of possession was omitted.

Q. In other words, you would assume, on the assumptions that I have given you, that a technical lawyer's error had been committed; is that right? A. Yes.

Q. And under section 139 of the Civil Code, the result of such an error would be the failure of the entire gift; is that correct? A. Yes, assuming that the usufruct forms an essential element of the gift.

By the Court:

Q. How should it have read? A. Well, the provision that was omitted would have been to the effect that Fritz von Opel reassigns to his parents the claim against the bank in New York for the delivery of the Opel shares.

Q. You had to say that notwithstanding that you say that you reserve the usufruct? A. If you want to create a usufruct then and there, you have to have a delivery of possession.

Q. Of course, this is a chose in action, not very tangible. The right to convey is the interest in the corporation, is

it not? What you convey by an instrument, when
2018 you convey an interest in the corporation, is just the interest in the corporation? The stock is simply evidence of it; isn't that right? A. Well—

Q. What I am trying to get at is, if you can convey it by the same instrument by which you convey a usufruct, do you have to have delivery there? A. Yes.

Q. You have to have delivery, in so many words, back? A. Yes, under the strict rules of German law.

The Court: I do not think that is American law. It may be German law. At least, I ruled the other way in a case I had.

We will adjourn now.

(At 3:35 p.m. an adjournment was taken until Wednesday, January 5, 1949, at 10 a.m.)

* * * * * *

2021 PROCEEDINGS

Thereupon—MAGDALENA SCHOCH resumed the stand and, having been previously duly sworn, testified further as follows:

By the Court:

Q. Let me get a little matter cleared up in my mind. When you speak of a delivery of stock and the necessity for delivery in order to complete this usufruct, you have in mind, I take it, the statement in the instrument itself of an assignment? Is that what you have in mind? That was the point I was really talking about when we adjourned last night. Do you have inclusion of the wording of assignment rather than actual delivery of the certificates themselves? Is that what you had in mind? A. Well, is a case where the stock is in the hands of a third person—for in-

stance, deposited with a bank—actual delivery can be replaced by the assignment of the claim which the owner has against the bank.

Q. In other words, if you say, "By this assignment I hereby assign all my right, title, and interest in and to that share of stock," that would suffice for the bringing into creation of a usufruct? A. You would have to say that,

"I deliver possession to you by assigning to you my
2022 claim against the bank."

Q. If you say you deliver possession in that language, then you do not actually have to hand over the certificate of stock itself? A. That is correct.

Q. That is what I was trying to get clear. All right.

What you would say was missing in this instrument was —in this so-called gift agreement, what you would say was missing, in so far as that reservation of title was concerned —what was missing was the wording that "I hereby assign or deliver—and/or deliver—possession of the certificates"? That is what was missing? A. What was missing were the words which delivered possession to the usufructuary.

Q. That is what I say. All there was was a reservation of an interest, but not words of delivery which constituted delivery or possession? A. Yes.

Mr. Burling: I should, first, merely for the record, like to have marked—and I offer it in evidence—Defendant's Exhibit 31-A, which is the German of the decree of August 1, 1931. We identified it in English yesterday, if Your Honor please. I offer it in evidence.

(Defendant's Exhibit 31-A was received in evi-
2023 dence.)

Direct Examination (resumed)

By Mr. Burling:

Q. Miss Schoch, you are suffering from a cold and have a hoarse voice? A. Yes; I have a cold and I ask the Court's indulgence.

Q. Now, did I correctly understand you to say yesterday at the close of your testimony that on the assumption that Plaintiff's Exhibit 5 is a bona fide instrument, that was intended to accomplish what it says on its face, and that it was in fact signed on October 5, 1931, and on the further assumption that it was hastily drawn up in a hectic atmosphere on that date, if you were merely to examine the instrument itself, you would conclude that what the parties intended to do was to make a gift reserving then and there a usufruct to Wilhelm and Marta von Opel, and that a technical lawyer's defect existed; and that on the further assumption that Wilhelm von Opel insisted upon the usufruct, then the entire gift failed for failure of an essential element of the gift pursuant to Section 139 of the Civil Code? A. Yes, that would be my conclusion.

Q. Did you hear Professor Kronstein testify to the general effect that under German law it is difficult or
2024 impossible to make a gift reserving then and there a usufruct, and that the most that can be done is to make a gift subject merely to a charge? A. That is what I understood from his testimony.

Q. Now, have you, since you heard him testify a month ago, looked at any cases decided by the Supreme Court of Germany on that point? A. Yes, I have.

Q. Have you found a case that bears on that point? A. I have found one case just decided by the Supreme Court in 1935, in which this is exactly what happened: that is, a gift of personal property was made by parents to their child with a usufruct in the property reserved to the parents.

Q. You refer, do you not; to the case decided on September 10, 1935, which is cited in 148 R. G. Z. 321-323? A. Yes, that is the case, in Volume 148 of the official collection.

Q. In that case, is it not true that parents made a gift of home furnishings to their daughter, who was a minor child? A. Yes.

Q. And that they by the instrument reserved to themselves a usufruct in the furnishings; is that correct? A. Yes.

2025 Q. Is it not also correct that thereafter creditors of the parents attached those furnishings? A. Yes.

Q. Am I right in thinking that the daughter then asserted that she had legal title to the property and that the attachment was void? A. Yes.

Q. Am I right also in thinking that two lower courts held that the daughter could not create a usufruct for the parents at the same time that the parents gave her the legal title? A. Yes, that is correct. The lower courts held that, first, a full transfer of title had to occur; then the daughter had to create a usufruct for the parents.

Q. And that was not what they had in fact done, on the facts of that case, was it? A. What they had in fact done was that they had executed one instrument in which the gift was made at the same time that the usufruct was reserved. No delivery of possession was necessary, because the parents already had possession. Therefore, everything could be done by this one agreement and in this one instrument.

Q. Miss Schoch, I am now just asking what the facts of the case are; I am not asking for the legal con-

2026 clusion yet.

The facts are that they made an instrument in which they purported to give to the daughter and to reserve the usufruct? A. Yes.

Q. The fact is that two different lower courts of Ger-

many held that you could not do that; that the usufruct failed; and that since the usufruct was an essential element of the transaction, the entire gift failed, and therefore the daughter had no title and no standing as against the creditors; is that right? A. Yes.

Q. In other words, two different lower courts of Germany applied the law as you understood Dr. Kronstein to state it; is that correct? A. Yes; I think that is what he said.

Q. What did the Supreme Court of Germany do when this case came up to it, with particular respect to the principle of law enunciated by Dr. Kronstein? A. The Supreme Court overruled the decisions of the lower courts and said that in cases of gifts of personal property with a reserved usufruct, the gift and the usufruct came into existence at the same time.

Q. The action of the court was to reverse the lower courts, which had applied Dr. Kronstein's principle; 2027 is that correct? A. Yes.

Q. Do you have the text of the opinion with you? A. I have a photostatic copy with me.

Q. I wish you would look at page 223 and tell me whether I am correctly translating from the German:

"Where personal property is involved and, as is the case here, the transfer of ownership and the creation of the usufruct are not only externally incorporated in one agreement, but where in addition both are inseparably connected in substance"—and then I will skip— A. Yes.

Q. So far the translation is correct? A. Yes.

Q. "The agreement between the minor and her parents concerning the creation of the usufruct had, therefore, a dual significance: on the one hand, as regards the creation of the usufruct; and on the other hand, as regards the transfer of title. Consequently, the two agreements embodied in one instrument had a dual result: acquisition of

title by the daughter and acquisition of the usufruct by the parents."

Then, skipping some:

"Accordingly, there is no possibility of separating
2028 the two legally relevant events. It cannot be said that the daughter only granted usufruct to her parents subsequently. Rather it must be said that she acquired only property which was burdened with a usufruct."

Is that what the Supreme Court of Germany said? A. Yes.

Q. Before I go on to a different topic, it is clear, is it not, that it would have been possible for the parents Opel to have given the 600 Opel shares to Fritz von Opel burdened by a usufruct which came into existence simultaneously and instantaneously? A. Yes; in my opinion, that would have been possible.

Q. That is what the Supreme Court of Germany held in the case we have just discussed? A. Yes.

Mr. Burling: May I have Plaintiff's Exhibits 7, 8 and 9, please?

(The deputy clerk handed papers to Mr. Burling.)

By Mr. Burling:

Q. At this point, Miss Schoch, I wish to vary the assumptions I have been asking about. I wish you to consider again, for the moment, that the transaction which is related in Plaintiff's Exhibit 5—the gift agreement— is
2029 not a sham but is a bona fide gift and that it was executed on October 5, 1931. But I ask you to assume also that on October 2, 1931, the purported donee, Fritz von Opel—that is, purported donee of the legal title, not the usufructuary interest—had gone to consult one of the most eminent lawyers in Germany, a Dr. Hachenburg, and had discussed the problem with him,

and that Hachenburg had prepared a document, which I will show you in a moment, and that that document was used for the basis for the preparation of Plaintiff's Exhibit 5, the purported gift agreement.

I will ask you if you would then come to the same conclusion to which you would come on my prior hypothesis. I show you Plaintiff's Exhibit 7 and ask you to assume that this is a letter which Hachenburg wrote to Wilhelm von Opel. I show you Plaintiff's Exhibit 8 and ask you to assume that this is a draft of the gift agreement prepared by Hachenburg.

I show you—I am sorry; I think I said plaintiff's. These are Plaintiff's Exhibits 7 and 8.

Now, I will show you Plaintiff's Exhibit 9 and ask you to assume that this is a memorandum entitled, "Fundamental Considerations," which Hachenburg prepared on October 2 and which Fritz von Opel took back to Wiesbaden with him on October 2, and which he discussed with his father and with the lawyer who drew up the final
2030 form of the gift agreement.

Now, my question is, would the additional assumptions which I have given you lead you to any different conclusion as to the intent of the parties and as to the legal effect of what was done? A. Assuming that the agreement that was made on October 5 was based on these drafts and considerations—

Q. That is correct; that is the assumption I now give you. A. Yes; in the light of these, what we may call, Hachenburg papers, I come to a different conclusion from the one reached merely on the basis of looking at the Exhibit 5.

Q. In other words, if we assume that the gift agreement was drawn up on the basis of the Hachenburg papers and that another lawyer was asked to draw up a final form merely as a device for saving legal fees which Hachenburg might charge, then you come to a different conclusion from

the one you testified about yesterday; is that right? A. Yes.

Q. Will you explain that, please? A. I see from the Hachenburg draft and the explanatory writings that what Dr. Hachenburg had in mind was an immediate gift of the stock from father to son and the creation of a usufruct for the father or for the parents in the near
2031. future.

Q. What is it, from the Hachenburg papers, that shows you that that was what was intended by Hachenburg? A. The intention of Hachenburg, as it appears from these papers, was that the stock—the Opel stock, which was the purpose of the gift, was to be placed into a holding company.

Q. Where do you see that, please? A. In Section 2 of the gift agreement.

Q. That is Section 2 of what we now assume to be Hachenburg's draft of the gift agreement, which is in turn Plaintiff's Exhibit 8? A. Yes.

Q. What does the Hachenburg draft of the gift agreement provide with respect to a holding company? A. It provides that Mr. Fritz von Opel is entitled to—upon demand of the donors obliged to assign the shares to a holding company which he owns. In this case the parents would have the usufruct in 75 per cent of the shares which the holding company will be required to issue in exchange for the Opel shares.

Q. What would the legal significance be of the assignment to the parents Opel of the shares of the holding company? A. Well, the draft provides that the shares
2032 shall be deposited in the name of the father.

Q. Perhaps I should rephrase my question. I withdraw my prior question and ask this one:

What would the legal significance be of the deposit of the holding company's shares issued in exchange for the Opel shares in the names of Wilhelm and Marta von Opel?

A. In my opinion, that would constitute the establishment of the usufruct, assuming that the bank—that it is understood that the bank holds the shares for Wilhelm von Opel as usufructuary.

Q. In other words, if Wilhelm and Marta von Opel agree that the shares of the holding company which holds the Opel shares are to be deposited in their name in a bank, then, if Fritz von Opel had done that, that deposit would constitute the delivery of possession sufficiently to create a usufruct then and there; is that right? A. Yes.

Q. Is there anything in any of the three Hachenburg papers which I have shown you—namely, the letter to Wilhelm von Opel, the draft agreement, and the memorandum entitled, "Fundamental Considerations"—which in any way shows that what Hachenburg was intending to do was to create not a usufruct but merely a claim which the parents would have against Fritz von Opel, either for income or for the creation of a usufruct at some vague
2033 time in the indefinite future? A. I cannot see anything in these papers which would support that view. In my opinion, Dr. Hachenburg made an elaborate provision for a usufruct to be created in the near future through this holding company.

Q. Will you state whether or not the language of the Hachenburg draft agreement is consistent or inconsistent with your view that what Hachenburg intended to do was to have a gift to Fritz von Opel, followed in the near future by a creation of a usufruct brought about through a holding company device? A. Well, the provision that follows the passage—that shortly follows the passage—I have just read, in which it is said that Geheimrat von Opel, and in case he should predecease his wife, then his widow may vote the deposited holding shares by virtue of the usufruct.

Q. If Geheimrat von Opel or his widow were to have merely an in personam claim to have Fritz create a usu-

fruct in the future, they would not have any right to vote the shares at all, would they? A. Not unless they held the shares.

Q. But if they did hold the shares under the agreement, they would have a usufruct; isn't that so? A. Yes.

Q. Do you observe the words in the Hachenburg
2034 draft to the effect that Geheimrat von Opel may vote deposited holding shares by virtue of the usufruct whenever the vote involved the declaration of the net profits and/or a resolution in respect thereto, including resolutions of the distribution of reserves and funds? A Yes.

Q. Going back to Dr. Kronstein's testimony a month ago, did you hear him tell me, on my cross examination of him, that there were different views in Germany—to be exact, three—as to the right of a usufructuary to vote shares: the most extreme being that he had no such right; the middle one being that he had a right to vote in so far as income was involved; and the most extreme on the other side being that he had the sole right to vote the shares? A. Yes, I heard that.

Q. Will you state what, in your opinion, Hachenburg was intending to do by the words of the draft which I just read to you? A. I think that Dr. Hachenburg was well aware of this conflict of opinions, and he wanted to make it perfectly clear that the rights of the usufruct in regard to voting should be—that is, he adopted what you call the middle view.

Q. In other words, Hachenburg was aware that
2035 there was doubt in German law on this point and sought to avoid any problem by solving it in the gift agreement itself; is that right? A. I think so.

Q. That is a problem which arises in connection with an in rem right, namely, usufruct, isn't it? A. Yes. He says expressly they shall vote by virtue of the usufruct.

Q. That is totally inconsistent, is it not, with the thought that it was intended that the Opels establish merely a claim for income or claim to have usufruct created in the future in order to secure a claim to income? A. Yes; that is, in my opinion, inconsistent.

Q. So, having seen the Hachenburg draft, is it not correct that you revise your first opinion, which was that the parties intended immediately to create the usufruct, and that the whole gift, therefore, may have failed because of failure to provide the technical language necessary to create usufruct then and there; and that you, having seen the Hachenburg draft, would now say that it was the intent of the parties to pass title immediately to Fritz von Opel; it being the intent of the parties also that soon thereafter Fritz von Opel would place the proceeds of the gift in a holding company and create a usufruct to his parents by depositing shares of the holding company
2036 in their name? A. Yes.

Q. I will now ask you assume something further. Let us assume that the intent of the parties was as you described and that a bona fide gift was intended and executed on October 5, and that thereafter Fritz von Opel acquired the shares of a Swiss holding company called Uebersee Finanz-Korporation. Let us suppose he placed the proceeds of the gift into Uebersee and that he deposited the shares of Uebersee in a bank safe deposit box and took the key and gave the key to his father's agent, it being understood by the father, the agent—and I will give the agent the hypothetical name of Hans Frankenberg—and it was understood by the father, by Frankenberg, and by Fritz that Frankenberg was to hold the key as agent for his father.

On that hypothesis would valid delivery of possession of the res have been made to Wilhelm von Opel? A. Yes.

Q. Would such delivery bring a usufruct into being? A. Such delivery would bring into existence the usufruct.

Mr. Boland: Your Honor, may I ask a question? This is under German law?

Mr. Burling: I was coming to that.

2037 By Mr. Burling:

Q. As a matter of German law, would it make any difference whether the safe deposit box was Box 1917 in the Schweizerische Kreditanstalt in Zurich or was in a safe deposit box in a bank located within the Reich? A. Yes, it might make a difference.

Q. Will you state what it is? A. It might make a difference because the German court might look to the Swiss law concerning a usufruct, because the situs of the securities was in Switzerland.

Q. You heard Professor Kaufmann testify as an expert in Swiss law that, as a matter of Swiss law, you could bring a usufruct into existence by delivering the key to the box in which the securities were? A. Yes.

Q. I am not asking you to testify as an expert on Swiss law; but assuming that Professor Kaufmann is correct as to the Swiss law, then, as a matter of German law, would it make any difference whether the securities were in Box 1917 in Zurich or were in a box physically located in Germany? A. No, that would make no difference.

Q So even if the box which I ask you to assume was in Zurich, on the hypothesis I have given you, a usufruct would come into existence at the moment that the
2038 key was delivered to this hypothetical person named Frankenberg; is that correct? A. Yes.

Q. Now, did you hear Professor Kronstein testify concerning what I believe he referred to as three possible ways of construing Plaintiff's Exhibit 5 in the light of the

Hachenburg papers—or three hypotheses? A. Yes, I remember.

Q Do you recall that he stated as his first hypothesis that they at first never intended to create an in rem right at all, but that they intended nothing beyond a mere claim which the father and mother could at their option exercise to receive 80 per cent of the income upon demand? A. Yes; that, if I remember correctly, was his first hypothesis.

Q. Now, is it your opinion that that is a possible construction of the papers?

Mr. Boland: Just a moment. I think, Your Honor, that this subject is confusing enough without misstating Dr. Kronstein. I remember this point very, very clearly.

Mr. Burling: I am endeavoring to do this in good faith. If counsel will state what the first hypothesis is—

Mr. Boland: The first hypothesis is that Dr. Kron-
2039 stein testified that using the gift agreement alone, having nothing else in front of you but Exhibit 5; there were three possible constructions or interpretations. Then, when he went to the Hachenburg draft, that eliminated some of those possible constructions. But the three potentials were on the gift agreement alone, Exhibit 5.

I think it would be very confusing—

Mr. Burling: I am genuinely confused, if Your Honor please. I thought all the hypotheses related to all four papers—that is, the actual gift, the draft gift, the letter, and memorandum.

If counsel will now state which hypothesis his expert asserts is the correct one, on the basis of all of the four papers, we can perhaps proceed more rapidly.

Mr. Boland: As I recall the interpretation of Dr. Kronstein, on the basis of the Hachenburg draft was his possibility 3, which was an in personam claim againt the donee, with the right to establish and to secure an in personam right through establishment of a usufruct.

Mr. Burling: May I ask, if Your Honor please, is that the position which counsel finally takes?

Mr. Boland: Is that question directed to the entire presentation of the case? Our case is based upon the facts and the clear intent, as has been testified to by the father, the son, and the lawyer who was present.

2040 The Court: I think the best way we can do this is to have you ask the questions, Mr. Burling, which you think would meet those problems—questions of law.

Mr. Burling: I was about to ask this witness if she agreed with what I thought and with what she thought Dr. Kronstein testified to.

The Court: I think the form of that might get us sometimes into trouble. You have different hypotheses from his.

Mr. Burling: I will put the hypotheses as my own.

The Court: That will relieve you a little bit.

Mr. Boland: Yes.

The Court: I get the point. Of course, you could include his name in there; and if Mr. Boland says he did not do that, he may include his name when he asks the other way. It does not make any difference. I understand that each one of you might have a little different view of what the doctor said.

Mr. Boland: I did not rise as a matter of objection but merely as a matter of assistance on the assumption that probably Mr. Burling had misinterpreted.

Mr. Burling: I quite agree with Mr. Boland. This is a different subject.

By Mr. Burling:

Q. I withdraw the question I previously put and
2041 ask you this:

Will you examine Plaintiff's Exhibit 5, the gift agreement? On the assumption merely that this is a bona

fide document and not a sham, and that it was executed on October 5, in your opinion is it possible to come to a conclusion, as a matter of German legal construction, that this document was intended to create not a usufruct but merely a claim which the parents Opel might exercise upon demand in the future for income? A. No. I think this construction would be inconsistent with the plain, unambiguous text of the agreement itself.

Q. In other words, if I ask you whether the hypothesis of that construction is right—is possible—your answer is, "No, it is impossible"; is that right? A. Yes.

Q. Now, I will take the second hypothesis.

Mr. Burling: I withdraw my remark.

By Mr. Burling:

Q. Am I right in thinking that the reason why the hypothesis I gave you is impossible is that the agreement, in terms, in its plain language, refers to usufruct, which is an in rem right, and that the German court would not construe an instrument purporting to create an in rem right as being intended to create merely an in personam claim? A. Yes, that is correct.

2042

Q. Now, I will vary the hypothesis. Will you now assume that you are given not only the gift agreement itself but also the Hachenburg papers? Am I right in thinking it is also clear that in the light of the Hachenburg papers it would be impossible for the German court to come to the conclusion that what was intended was merely a claim and not the creation of an in rem usufructuary right? A. That is my opinion.

Q. It is your opinion, is it not, that Dr. Hachenburg knew the difference between a claim and a usufruct? A. I think so. I think if he provided for a usufruct, he meant a right in rem.

Q. You agree, I take it, with Dr. Kronstein, that Hachenburg was one of the most distinguished and learned lawyers in Germany, do you not? A. Oh, yes, indeed.

Q. So the first hypothesis I gave you you reject either on the basis of the instrument itself—that is, Plaintiff's Exhibit 5 itself—or on the basis of that instrument plus the Hachenburg papers? A. Yes.

Q. Either way, you reject the hypothesis? A. Yes.

2043 Q. Now, I want to give you a second hypothesis. Is it either possible or likely that a German court would construe the document Plaintiff's Exhibit 5 as effecting an agreement of the parties not to create a usufruct in the near future, but as embodying merely a right which the parents were to have—an in personam claim—so that if at some remote future time they felt like it, they could demand that Fritz von Opel create a usufruct? A. I think I could not put that construction on the gift agreement itself because, again, of the clear language which says the usufruct remains or shall remain with the Opels.

Q. Let us vary the hypothesis slightly. Suppose I also give you the Hachenburg papers. Then what is your opinion as to the hypothesis that I just put? A. Well, the Hachenburg papers spell out the usufruct idea and elaborate the manner in which the usufruct is to be set up. Therefore, I cannot conclude that a mere claim for some—that establishing a usufruct at some future—vague future—time was intended by Dr. Hachenburg.

Q. In other words, the second hypothesis is also unlikely, either on the basis of the instrument itself or on the basis of the instrument coupled with the Hachenburg

2044 papers? A. Yes.

Q. Let us take a third hypothesis, and that is that what the parties intended was to create instantly a claim which the parents could exercise, if they felt like

it, for money coupled with a right which they might or might not in some vague future time also exercise to create a usufruct in order to secure their claim for income. First, do you understand the hypothesis? A. Yes. It is a somewhat complicated hypothesis, but I think I understand it.

Q. I now give you only the instrument itself—that is, Plaintiff's Exhibit 5. A. Excuse me; I do not have it here. Just to make sure.

(Mr. Burling handed a paper to the witness.)

Thank you.

Q. Do you think it likely that the German court would put that construction on Plaintiff's Exhibit 5, merely reading the face of the instrument? A. I don't think so.

Q. Will you explain why you don't think so? A. Because, as I said just a minute ago, it is a somewhat complicated construction, and it would have to be spelled out somehow in the instrument itself. In other words, you cannot read into an instrument an intention of
2045 the party which is not found in some expression—either a complete or incomplete expression—in the document.

Q. In the document itself, do you see any expression of the hypothesis I just put to you? A. No, I don't.

Q. Will you also look at the Hachenburg papers and state whether on the basis of the Hachenburg papers and the instrument itself you think it likely or unlikely that the German court would adopt that hypothesis? A. I think it is highly unlikely, for the same reason that I have given just now.

Q. Do you see anything in the Hachenburg papers which indicates that it was the intent of the parties to obtain a right, an in personam claim for income, coupled with the right that they could at some point in the future, if they felt like it, create a usufruct in order to secure that claim?

A. No, I cannot read that interpretation from the Hachenburg papers.

Q. Do you see anything in the papers—in the Hachenburg papers—where Hachenburg said anything about such an intent? A. No.

Q. Are the Hachenburg papers consistent or inconsistent with that hypothesis? A. I think they are in-
2046 consistent.

Mr. Burling: Now, if Your Honor please, I wish to read a sentence from Dr. Kronstein's testimony, as a basis for examining this witness. I am reading from page 410 of the record.

"If you take my first possibility in regards to the first paragraph on page 2, you have to interpret the section 5 this way:

"First, that the Opel parents can make a claim against the son; but without making a demand, no obligation on the side of the son can exist."

The Witness: I take it that section 5 refers to the gift agreement?

Mr. Burling: Yes. Dr. Kronstein was testifying about the purported gift agreement of October 5.

The Witness: Yes.

By Mr. Burling:

Q. Now, do you have an opinion concerning Dr. Kronstein's testimony that I just read to you? A. Yes, I have. I do not agree with Dr. Kronstein's interpretation.

Q. Will you explain why you do not? A. Because I think the theory that a mere in personam claim for income was intended is contradictory to the wording and the tenor
2047 of this paragraph. I cannot find any indication of a right in personam for income alone.

Q. Now, I am going to read another portion of Dr. Kronstein's testimony, from page 442 of the record.

"Question: Is there anything in this letter, Plaintiff's Exhibit No. 7, which would shed light on the intent of the parties?"

Will you look at Plaintiff's Exhibit 7, please? A. Yes, I have it here.

Q. "Answer: Yes.

"Question: Would you point out the particular verbiage of the letter and read it aloud, please?

"Answer: One point is to be found in the last part.

"Question: The last paragraph?

"Answer: Of the letter.

"Question: Of the letter?

"Answer: Yes.

"It says: 'But the same would apply if the contract were to provide not for a true usufruct, but instead for a purely personal claim to the payment of a corresponding share of the profits. This right also would be part of your property. It is to be evaluated in the same manner as the usufruct itself.'"

Will you examine that portion of the letter to 2048 which Dr. Kronstein referred? A. I have.

Q. Will you state whether you agree with Dr. Kronstein that this indicates that the parties intended a claim for income as opposed to the creation of a usufruct in the near future? A. In my opinion, this indicates just the opposite.

Q. Will you explain why? A. In the preceding paragraph, Dr. Hachenburg explains that the usufruct will have to be included in the property tax return. Then he goes on to explain that this usufruct is not especially expensive from the point of no taxation, because even if a usufruct will not establish but a purely personal claim, this right would also have to be reported as property under the property tax. In other words, he speaks in the subjunctive mood.

Q. Just a moment. I should like you to look at the German.

Mr. Burling: May I have 7-A, please?

(The clerk handed a paper to Mr. Burling.)

By Mr. Burling:

Q. Will you state whether in German grammar there is a usage comparable to the English use of the subjunctive for conditions contrary to fact? A. Yes, the usage is just the same.

2049 Q. In other words, what Dr. Hachenburg is saying, then, is that if this were something else, you would still have to pay the tax? A. Yes. It is the same thing as saying, "If I had a million dollars, I would have to pay a high income tax."

Q. And the use of the subjunctive would indicate that either you do not have a million dollars or that this was not a personal claim; is that right? A. Yes.

Q. Now, I am coming to another topic, Miss Schoch, and I ask you again to assume various things. I ask you to assume that a valid gift was made on October 5—that is, that there was not a sham; that it was executed on October 5; and that thereafter Fritz von Opel placed the proceeds of the gift into Uebersee, placed the shares of Uebersee in a box in a bank in Zurich, and by agreement between himself, a hypothetical man named Frankenberg, and Wilhelm von Opel delivered the key to Frankenberg as agent for Wilhelm, thus creating a valid usufruct.

Assume that all this happened on or after October 5, 1931; and assume further that Wilhelm and Marta von Opel never received a licens; but waived or abandoned their usufructuary interest in those securities of a Swiss corporation.

Would it have been possible at any time after
2050 October 5, 1931 for them to have waived or abandoned such interest? A. Under German law, they

required a license to waive such interest. In the absence of a license, such a waiver would have been void.

Q. Therefore, even if they purported to do so, the usufructuary interest would remain in them; is that right? A. Yes.

Q. What section or what provision of German law required a license to engage in this waiver? A. A provision in the foreign exchange decree, which said that any transfer or other act of disposition concerning foreign securities requires a license.

Q. What provision is that? A. I can refer you to the decree of August 1, 1931 and its subsequent decrees and laws which are incorporated.

Q. In other words, it began with paragraph 4 of the decree of August 1, 1931, and was then restated in subsequent decrees? A. I think it was section 4.

Q. Is it not true that at no time after August 1 could you dispose of foreign securities, if you were a devisen inlander, without a license? A. That is correct.

Q. Is there any provision of German law which says that a purported disposal in violation of law is

2051 void? A. Yes.

Q. What section is that, please? A. First of all, there is a provision in the German Civil Code which provides that a legal act which violates a statutory prohibition is void.

Then, there is a special provision in the foreign exchange control decree of August 1, 1931, and in subsequent legislation, which expressly says that a transaction which requires a license—no; it says that any transaction made contrary to the provisions of this law is void.

Q. You have no doubt, do you, that a waiver or abandonment of usufructuary in foreign securities was within the purview of the foreign exchange control legislation? A. Yes.

Q. You do not have any doubt? Is that what you mean? A. Well, it is my opinion that a waiver of usufruct is an

act of disposition within the meaning of the foreign exchange control law.

Q. Thank you. Now, who—that is to say, what agency or what official of the Government—was entrusted with the duty or supervision of issuing licenses for disposition of foreign securities? A. The granting and handling
2052 of licenses was in the jurisdiction of the so-called foreign exchange offices, which formed part of the regional tax collector's office.

Q. That is to say, in the first instance, throughout the country there were foreign exchange control offices? A. Yes.

Q. What agency of the German Government had the obligation of supervising them? A. These agencies were first placed under the jurisdiction of the Reichs Ministry of Economic Affairs in 1931. Later a special central agency was established under the name of Reich Office of Foreign Exchange Control. And again, I think in 1938, the supervision was placed back into a department of the Reichs Ministry of Economics.

Q. Will you state whether at any time the Reichsbank had authority to issue licenses to engage in foreign exchange—in the disposition of foreign exchange? A. The Reichsbank had a very limited jurisdiction to grant such licenses—that is, only in connection with licenses applied for under one of the so-called standstill agreements—that is, agreements which were entered into between groups of foreign creditors and German debtors.

Q. More specifically, at any time from October 5, 1931, until June, 1942, did the Reichsbank have authority to license the waiver of usufructuary interest in Swiss
2053 securities held by—usufructuary interest being held by German residents? A. No. The Reichsbank did not have such jurisdiction.

Q. Coming to the agency which did have jurisdiction, will you state whether or not it was required by German

law that such licenses be in writing? A. Yes, that is expressly provided for.

Q. That is, that licenses must be in writing? A. Licenses must be in writing.

Q. It is your testimony, is it not, that if there was no license obtained in writing from the agency having jurisdiction—namely, the Foreign Exchange Control offices—then any purported waiver of usufruct after October 5, 1931—I am referring to usufruct in Swiss securities—would be totally void and of no effect; is that correct? A. Yes.

Q. Now, let us vary the assumption and assume merely that what Wilhelm and Marton von Opel acquired as the result of the gift agreement of October, 1931, was a claim for income coupled with a claim to have Fritz von Opel at some indefinite point in the future create a usufruct in order to secure that claim. Do you understand the 2054 hypothesis? A. Yes.

Q. In other words, we are now dealing with an in personam claim for income and for the creation of a usufruct.

Let us assume, further, that the res given on October 5, 1931, was put into a Swiss holding company and that the claim attaches to the Swiss holding company. Do you follow me? A. Yes.

Q. Was it possible, as a matter of German law, in your opinion, to waive, abandon, or give away such an in personam claim to Swiss securities without a license under the Foreign Exchange Control regulations? A. Well, I would like to distinguish between the in personam claim for income—

Q. Will you testify, first, about that? A. Now, as regards that, it is clear that the waiver of such a right for income would require a license, because this claim would be a claim payable in foreign currency; and claims payable in foreign currency under the Foreign Exchange

Control law could not be transferred or otherwise disposed of except with a license.

Q. And again, the license would be issued in writing by the Foreign Exchange Control office, would it not? A. Yes.

Q. No other agency of the German Government
2055 would have jurisdiction to grant a license? A. That is correct.

Q. And an oral license would not be valid, would it? A. No.

Q. And a purported abandonment or waiver of the claim by the claimant would be void under German law, would it not? A. Yes.

2056 Q. So that if all we are talking about is a claim for income, it is perfectly clear, is it not, that if a license was not obtained, then whether or not the parties purported to abandon it, the claim continued to exist? A. That is correct.

Q. That would be true—that is, the claim would continue to exist—until the year 1942; isn't that right? A. Yes.

Q. Now, let us come to the question of whether the parties could waive—abandon—a claim to have a usufruct created in the future. Will you discuss that, please. A. Well, that would leave some doubt. This is a rather unusual kind of claim—

Q. Have you, at my request, looked for cases dealing with the application of the foreign exchange control laws to purported abandonments or waivers of claims to create usufructs in the future? A. Yes.

Q. And what success have you had? A. I have not been able to find any precedents which would be applicable to this particular kind of claim.

Q. In other words, this situation would be so rare that there is no case dealing with it in the German reports; is that right? A. That is correct.

2057 Q. Now, are you able to apply any techniques of German law so as to tell us what a German court

probably would have done had such a situation arisen? A. I would say this: Even if the term "claims payable in a foreign currency" is primarily intended to cover claims in money, yet the term had to be applied and was applied in a broader sense. For instance, it was applied to cover claims for damages where the damage was not yet liquidated, or it was held to cover claims from which eventually money claims would arise.

Considering further the purpose of the foreign exchange control regulations, to make available to the German economy all possible sources of foreign exchange and foreign currency, I would conclude that the German court would be inclined to consider such a claim for the establishment of a usufruct, which eventually would result in foreign currency which would flow into Germany—that a court would consider this to come under the concept of a claim payable in a foreign currency, particularly since the foreign exchange regulations and the requirement of a license do apply to a transfer or act of disposition concerning foreign shares, foreign securities, and do apply clearly to a claim for money accruing from these foreign securities.

So this particular situation might appear as a loophole for parties who have a claim for the establishment
2058 of a usufruct, and by not exercising the right to have the usufruct established, they would deprive the German Government of this accrual of foreign exchange.

Q. So that your conclusion is, although you can find no case precisely in point, that, as a matter of construction of the foreign exchange laws, a German court would in fact hold that a waiver of a right to have a usufruct created in the future was void unless it was licensed; is that correct? A. I would say that that would be highly probably in the later thirties, when the German foreign exchange situation became tighter and tighter. I think there is a

strong probability that the court would have decided that way.

May I add something to what I just said?

Q. Please do. A. I would also, in reaching this conclusion—I would also consider a provision in the rules and regulations implementing the foreign exchange control law of 1935.

In these rules and regulations it is provided that, with regard to the duties of tendering foreign exchange, foreign securities, and claims payable in foreign currency, it is provided that where the party, which is under a duty to tender, tenders to the Reichsbank a claim payable in foreign currency which is not yet due, then this party is under a duty to bring such claim to maturity as soon as possible.

So that again points in the direction of my con-
2059 clusion that parties were expected to do all they could to make this foreign exchange available to Germany.

Q. Now, let me ask you this. Would a director of the Reichsbank have any legal capacity in the year 1937 or 1938 to declare that a right to have a usufruct created could be waived without a license? A. In my opinion, such a declaration was not within the jurisdiction of the Reichsbank.

Q. And supposing now that a director were to say, "We do not regard a waiver of a right to have a usufruct created as coming within the foreign exchange control regulations." Would such a statement made by a director of the Reichsbank have any legal effect whatsoever? A. I don't think so.

Q. And supposing he were to say instead, "I do not want to discuss legal problems with you. What I am interested in is getting foreign exchange returned to the Reich," would that statement have any legal bearing on whether or not an unlicensed waiver of a right to have

a usufruct created was void? A. Clearly, such a statement would have no legal effect.

Q. It would be, as a matter of German law, totally irrelevant, would it not? A. Yes, sir.

Mr. Burling: If Your Honor please, I would like
2060 to recapitulate. I think I can do it briefly. Then I will be through.

By Mr. Burling:

Q. Is it not your testimony, Miss Schoch, that on the assumption that father and son agree that no gift at all is to be made, but that a purported gift was to be made, under which the son would take the father's money out of Germany, out of a locked German safe, such an agreement did not pass title at all to the son? A. That is correct.

Q. And if nothing further were done until June, 1942, title would remain in the father? A. Yes.

Q. I ask you to assume nothing more than that Plaintiff's Exhibit 5 was executed in November 1931 and that in October, 1931, the Opel shares, which are the subject of the purported agreement, had been sold to General Motors against a claim for dollars and General Motors stock. Then is it not correct that the purported gift was void, as title would remain in the father? A. That is my conclusion.

Q. And, again, title would remain in the father until 1942, assuming nothing further happened? A. Yes.

Q. And assuming now that there was no sham,
2061 but instead a bona fide gift made on October 5, 1931, and assuming that the gift was prepared on the basis of the Hachenburg papers that you have before you and assuming one further thing, that the proceeds of the gift were placed in a holding company in Zurich and that

the shares of the holding company were put in a box and the key to the box given to our hypothetical friend, Frankenberg, you would think that after that delivery to Frankenberg a usufruct arose in the father and mother, would you not? A. Yes.

Q. And under that usufruct, they would have the right, to co-possession of the res? A. Yes.

Q. And a right to a voice in the management of the res? A. Yes.

Q. And a right to an income less an in personam income to Fritz of 20 percent? A. That is right.

Q. They would have an in rem right in the property as a matter of German law? A. Yes.

Q. And unless a license was obtained in writing from the Reich foreign exchange office or subsidiary, it would have been impossible for Wilhelm and Marta von Opel to have waived that usufructuary right up to and including the year 1942; isn't that right? A. Yes.

2062 Q. So that that peculiar interest in the property, on the assumption I have given you, would be in Wilhelm and Marta von Opel in 1942, wouldn't it? A. It would.

Q. Even assuming that the key to the box was not given to Frankenberg as Wilhelm's agent, you would still assume that Wilhelm and Marta von Opel had an in personam right to require Fritz von Opel to create this usufructuary right, wouldn't you? A. Yes.

Q. And it is your best opinion, is it not, that at no time after October 5, 1931, could they have waived this in personam right validly without a written license from the Reich foreign exchange office? A. Yes.

Q. And if they did not obtain a license from the Reich foreign exchange office, then the in personam claim would, on the assumption that nothing further happened, remain in them up until 1942? A. Yes.

Q. So that even on the assumptions which I have now given you, in 1942 Wilhelm and Marta von Opel could

require, as a matter of law—as a matter of German
2063 law—Fritz von Opel to create a usufructuary right in Wilhelm and Marta? A. Yes, I think so.

Mr. Burling: You may inquire.

Cross Examination

By Mr. Boland:

Q. Will you describe, Miss Schoch, briefly, the meaning of scheinvertrag under German law? A. A scheinvertrag is a purported transaction entered into by two parties which are agreed that the intention that is expressed in their agreement is not their true intention.

Q. And this necessitates, does it not, an intentional false appearance? A. It necessitates—

Q. It is an agreement that what has been agreed to in writing, for example, is not true? A. Yes.

Q. Now, I have some hypothetical cases here, Miss Schoch. If you will just bear with me, we will go through them.

Suppose that A has real property and that A wants to save property taxes. Let us assume that A is very rich and therefore in a high tax bracket and A decides to transfer the property to B, either as a gift or for a nominal consideration, and his sole purpose under this hypothetical case is to save taxes. Is this a schein-
2064 vertrag? A. If there is a true intention that a gift shall be made—

Q. Let us assume that this is all that we have before us. This is all that we have. Do you want me to repeat the facts? A. Yes, please.

Q. A has real property and he wants to save property taxes. He is very rich and in a high tax bracket. So, therefore, he transfers this property to B, either as a gift or for cheap or nominal consideration. His sole pur-

pose is to save taxes. The question is, is that a scheinvertrag? A. On these facts alone, no.

Q. Let us take hypothetical No. 2. A is in financial difficulties. He has a very valuable diamond and he wants to protect it against creditors, so he transfers this diamond for a cheap consideration or as a gift to his cousin. Is this a scheinvertrag? A. No.

Mr. Burling: Your Honor, I object unless the facts are stated. The testimony is, and it has been brought out, I think, very clearly that a scheinvertrag is a sham transaction. I think we are agreed—

Mr. Boland: Well, we are not necessarily agreed on sham transaction. We are agreed on what schein-
2065 vertrag means, I think, according to Miss Schoch. We will accept her definition.

Mr. Burling: The witness testified that the correct translation of that term was sham transaction just yesterday. Counsel is putting a case which leaves out the essential fact, which is, what is the intention of the parties? It either is or not intended to make a gift or it is or is not intended to be a sham. I think counsel should not put hypothetical questions which contain very adroitly phrased ambiguities.

Mr. Boland: The adroit ambiguities are not intentional, Your Honor. I might state here that it seems to me that in this case we have had no evidence whatsoever of any intent for a sham transaction. It is purely hypothetical and speculative.

These are merely an analysis of questions under German law to find out just how far Miss Schoch goes, on a limited number of facts such as we have got in this case. We have no intent here shown that the parties intended to sham.

Mr. Burling: I am not trying to ask Miss Schoch to decide whether what happened in Wiesbaden is a sham.

I wanted to bring out that, in the German law, if the parties intended to sham, then it is void, and I wish counsel would tell the witness what the facts are he is interrogating about and what is the intent of the party.

Mr. Boland: I gave the intent. The intent in the
2066 last hypothetical was solely for the purpose of protecting the diamond against creditors. That is the only intent in the case.

Mr. Burling: That is a description of motive, but Your Honor must hear bankruptcy cases, by the score, where there are transfers where the intent is to defraud the creditors. You also must hear cases where Your Honor finds that the intent was not to defraud the creditors.

The Court: I think if she says there is any element there that makes it impossible for her to tell, she can answer it that way. I think I had better give him considerable latitude on what it would amount to.

Mr. Burling: As long as it is clear.

The Court: If the witness cannot answer the question—

Mr. Burling: As long as the witness is not being misled, I make no objection.

The Court: She can say if she does not know.

Mr. Boland: If the witness will state that under German law, under such a set of facts, she cannot come to any conclusion, I will accept that and go on.

The Court: I think you ought to feel at liberty to do that. If you think you are missing some essential facts, you may do so.

The Witness: Well, I think the one essential fact that has to be present in each hypothetical case is the
2067 intent of the parties.

By Mr. Boland:

Q. Let me ask you this question. Is it your opinion that under German law, on such a set of facts, a court

could not come to a decision one way or the other? A. I think the court—if the court had no other facts—

Q. That was my assumption, that the court had no other facts but the facts that I gave you. I realize that Mr. Burling made the objection for you, and not you. A. Well, I think that is a rather remote hypothesis, because in cases like this there are far more numerous facts before the court.

Q. It is your opinion that on the basis of this hypothetical there are not enough facts for the court to determine whether this is or is not a scheinvertrag; is that correct? A. That is correct.

Q. That is your testimony? A. Yes.

Q. Thank you.

The Court: That may depend a little bit on who is bringing the suit, whether it is a creditor or whoever it is? Wouldn't that make a difference? The burden of proof would make a difference?

Mr. Boland: Well, I asked the general question.

2068 The Court: I do not know the German law, but I would be surprised if it would not.

By the Court:

Q. Does the burden of proof have some significance in German law? A. Surely. In German law the person that alleges that a transaction is a sham transaction has to have enough proof, and that party will bring before the court all facts which might enable the court to decide as to intention.

By Mr. Boland:

Q. Let us see whether there are enough facts in my third hypothetical, Miss Schoch.

Let us assume that there are rumors that the legislature—we are in Germany—will enact a statute which

gives the Government a right to take all estates if there is no close relative of the deceased alive. More or less, you understand what the American theory of escheat is? A. Yes, indeed.

Q. This is not as limited as our theory of escheat. It was intended to broaden and take in more property.

Let us assume that there is a rumor to this effect in Germany. Now, A's closest relative is a fifth cousin, so A gives his fifth cousin this property and says, "I understand that they are going to enact some legislation which might take my property upon my death and just
2069 give it to the state, so I want to give it to you now," and he does give it to this fifth cousin, and it consists of six million marks shares as a gift, and the only fact as to the intent is that but for the fact of this proposed pending legislation, this gift would never have been made. Is that a scheinvertrag? A. Again, all I can say is that if the court is convinced that the party intended a gift, then the motive for the gift will not change that conclusion.

The Court: Are not we all in agreement—are not both sides in agreement—

Mr. Boland: Frankly, I do not know whether we are or not.

The Court: If they—Mr. von Opel and his wife—made an absolutely bona fide gift to the son to avoid foreign exchange, or whatever reason it was, it was a bona fide gift and he divested himself of all interest in his wife and all interest in it, I think we will all agree that that is not a scheinvertrag.

Mr. Boland: If we are all agreed, I will not continue—

Mr. Burling: I shall argue that the totality of the evidence is that it is not so.

The Court: I understand that. If your argument is going to be that, by that act and by virtue of subsequent acts that you say occurred, he did not intend absolutely

to pass the title, that he intended to reserve that to
2070 himself, and he went through this formality in order to beat, so to speak, the foreign exchange, that is what a sham is, in my judgment, and I certainly would think that it would be that in Germany. If I give my property absolutely away, with perfectly good faith, and I can accomplish beating taxes, that is not a sham in any law.

Mr. Boland: That is the point, Your Honor.

The Court: I would not think it would be.

Mr. Boland: I gathered from Mr. Burling's statements all along that he is going to argue that insofar as this was an attempt to more or less go beyond the devisen laws and get beyond the foreign exchange, and that because of that it must have been a sham transaction.

Mr. Burling: That is a matter of evidence.

Mr. Boland: That is his No. 1 contention.

The Court: You do undertake the burden, do you not, Mr. Burling, of saying that that is an item—this idea of foreign exchange—together with other items of evidence, tending to indicate that Mr. and Mrs. von Opel did not divest themselves of the title by that transaction, but intended to retain title?

Mr. Burling: Your Honor exactly apprehends my position as a possibility, but I would like to think a little more of where the burden is. The burden starts with my friend.

The Court: I am not talking about the burden,
2071 but we are getting into a whole lot of questions over sham where there is no disagreement. If we have a document fair on its face and absolutely intended by the parties to divest them of all interest, whether it be to defeat the foreign exchange, defeat creditors, or defeat taxes, or anything else, that is absolutely fair on its face but absolutely made with the intention of both of the parties to divest themselves of all interest, there is no sham to that.

Mr. Burling: That is correct, Your Honor.

The Court: On the other hand, as I understand your contention, you say that they wanted to avoid some possible laws with regard to foreign exchange.

That situation, taken into account with other circumstances which you claim you have established, by virtue of setting up an agency in respect to the holding of some of the stock, and by virtue of the use of usufructuary provisions, and by virtue of control by Frankenberg, and so forth, and a lot of other contentions you make, tends to indicate that that was not a bona fide or intentional divesting of interests, but there was an interest retained and therefore that this transaction was a sham; it was not really a divesting. That is what he is arguing, as I understand it.

Mr. Burling: Yes, Your Honor; that is exactly my argument.

2072 The Court: If we are all agreed on that—and I think we are—these hypotheses do not help us very much.

I know what you are talking about. If the divesting itself and everything else is absolutely in the open, as you contend it is, the fact that it is trying to defeat foreign exchange would not make it a sham.

Mr. Boland: The ultimate point I want to bring out, Your Honor, is that the one way to avoid problems of foreign exchange was to pass title, and that was the only way to do it.

Mr. Burling: I do not agree with that.

Mr. Boland: At least, if I can't bring it out through these witnesses, these are all actual German cases, and we have the decisions on these cases.

The Court: You mean on what a sham is?

Mr. Boland: What a sham is, and I want to take her through a series of cases. Of course, she has not had practice in Germany; she might not be able to answer.

But Dr. Kronstein has indicated, and Mr. Gros has indicated, and Dr. Flatow has indicated that the one important thing was to pass title if you wanted to take advantage of the loophole.

Mr. Burling: If you wanted to do it legally, but if you wanted to commit a crime in Germany, as Dr. Kronstein agrees, you could purport to pass title.

The Court: We are still not having any trouble. We still go right back to the proposition that you
2073 passed title or intended to pass it. What is a sham?

You go through one deal and have in mind or an agreement on the side of another deal. That is what a sham is. In truth and in fact, it is the side deal, whereas this on the face of it is a sham. That must be the law. If it is any different anywhere else, I have got to have sham redefined to me. But I think we are all agreed on that.

Mr. Boland: Yes, we are.

Mr. Burling: We certainly are.

The Court: I think we are all agreed on that. I do not have any quarrel with the cases that you have mentioned. Until we get to a point of disagreement, I do think we are probably wasting time. If we are not agreed on it, I will give you all the latitude in the world.

I think what you want to bring out is if the German authorities hold over and over again, as they do, I think, in this country, and probably everywhere in the world, that it was not a sham if you passed title and had intended to pass title and you do not have something on the side saying, "I retain something" or "I get something" "we do not mean it."

Mr. Boland: With the additional consideration that if you are trying to take advantage of a loophole in the law, it does not indicate you are trying to commit a sham.

Mr. Burling: That is a matter of evidence.

2074 The Court: Whether it happened or not is a question of evidence. I think he has a right to show that.

Mr. Burling: I do not think we are in any disagreement, Your Honor. My point is that the motive is, of course, one factor which goes to the question of whether or not it is a sham. I gave my little boy, let us say, a tricycle at Christmastime. The fact that it was Christmas and that I have a little boy and it is customary to give toys to children on Christmas Day would be evidence that it is not a sham.

The Court: I said it two or three times. I meant to say —I think I did—that your argument is that this fact that he wanted to defeat a possible law with regard to foreign exchange is evidence that he did not divest himself of title?

Mr. Burling: Yes, Your Honor.

The Court: I agree with that, but I do not think that that alone, as I understand your point, necessarily defeats the bona fides of the gift. I mean that fact alone.

Mr. Burling: I agree with that; it is the totality of the facts.

The Court: Aren't we in agreement on that, then?

Mr. Boland: I am not sure I understand.

The Court: In other words, he agrees that if he wanted to defeat foreign exchange, if we believe that this is an absolutely bona fide transaction, no reservation of title, nothing on the side other than is what is on that

2075 face, I have done this to circumvent foreign exchange, and it is a loophole, that in and of itself does not render this an ineffective gift. I think he agrees to that.

Mr. Boland: Yes.

The Court: However, his position is that he has a right to take that factor into consideration as a motive, so to speak, for having the side agreement and arguing to me that that is the reason they had a side agreement, and

these other facts show this side agreement; but I do not think that affects the definition of either one of you on sham.

I do not want to hold you down, but I think we are, all of us, in agreement.

Mr. Boland: I think we are if Mr. Burling would agree that under German law if you wanted to take advantage of a loophole in the law, the thing to do is to pass title. That is the point.

Mr. Burling: I do not agree to that. Another thing to do is what I say was done here. It did not work out very well, as it turned out.

The Court: I think the reason he does not agree to it is that he says he has other items of evidence, and he wants to argue that along with it. I think that is the reason. I think he said that if that was all he had, he would agree.

Mr. Burling: If we had no other scintilla of evidence other than this motive point, I think I would agree
2076 that if we had the burden we would not win.

The Court: I am not talking about winning now; I am talking about what is a sham. I am not talking about winning. The winning end of it involves the burden of proof, but what constitutes a sham does not. That is what he is talking about.

Mr. Burling: Yes.

The Court: Well, now, does that go far enough for you?

Mr. Boland: I think it will, Your Honor. I think I will drop it.

The Court: I do not want to restrain you in that regard. I do not think there is the slightest bit of doubt about it. We have some of the most reputable lawyers in the country and some of the finest concerns going through loopholes to defeat taxes, and they are upheld over and over again. There is no sham. I mean, there is nothing dishonest about it. But if you find that there is a retention of title there, and you bring into those proceedings

some reservation, some side agreement, or some idea that this purported assignment or this prima facie evidence of assignment did not mean what it said, then that is a sham, and that is a fraud and a wrong.

The same way, as he said, in bankruptcy. If you have a perfectly bona fide transaction in bankruptcy and you do not have any arbitrary time involved in it, and you have a question as to whether it is bona fide or not, the
2077 mere fact that he goes into the transaction might not be material beyond a certain date.

That is certainly my view of the law, and unless somebody shows me the German law is to the contrary, I am going to follow that, because I cannot conceive of a sham being anything else.

Mr. Boland: I agree, Your Honor.

The Witness: I may say that that is exactly what the German law is.

The Court: I think we all agree with that. The doctor agrees with it. So I think we are all right.

I will tell you one thing that I am a little bit interested in. I do not know how you can develop it, and I do not know that you have touched on it. I am trying to know just exactly how to frame it in my own words.

This October 5, 1931, transaction or transfer, let us say, was to avoid the regulation or some regulation either in effect or coming into effect with regard to foreign exchange. Now, I would like to know from these two lawyers —both of you gentlemen—would the form of this usufructuary provision make any difference with regard to those regulations? In other words, would the fact that it was a right in rem have one effect on the regulations and the fact that it is one in personam, such as the doctor says it is, have any effect on it?
2078 I do not know whether you covered it or not. I did not quite bite down on it if you did.

Mr. Burling: It is a question of degree. Miss Schoch is able to testify she feels certain that, if it is a right in rem, then it could not have been waived, assuming it was waived.

The Court: I am not speaking about the waiver; I am speaking about the intent at the time.

In other words, there is considerable argument here in this case with regard to the fact as to whether the October 5, 1931, agreement created an interest in rem or in personam or one which might call into being a right in rem in the future. Isn't that right? That is one phase.

It is also said that Dr. Hachenburg plainly provided for an in rem transaction in his notes.

Now, plaintiff's expert on the law, as I say, comes around to the point where Mr. Stansfield drew it, and he changed it around, the effect of which was to create something in the future, which might or might not come into being.

Now, what I had in mind is, with those two situations—No. 1, Hachenburg, which gave the right in rem; No. 2, Stansfield, which might or might not—she said it did—would the fact of the doctor's interpretation of that, that it gave only a future right, have any effect or bearing or any significance with regard to the foreign exchange
2079 situation? Do you see what I mean?

Mr. Burling: I believe, Your Honor, that it is clear that in either way it would be income arising in foreign exchange, which would have to be tendered.

The relevance—and I think the reason so much time has been spent on it—of whether it is a right in rem or a right in personam is twofold. The first is that we wish to get the greatest possible right in von Opel, that is, a right in rem.

The Court: You dealt with that very proposition on the question of license, but not on the idea of whether it had any bearing on the foreign exchange.

Mr. Burling: That is the second of the twofold significance, if Your Honor please. The second relates solely to waiver.

The Court: To waiver?

Mr. Burling: Yes, Your Honor, but it is only then that it is important.

It is asserted now that whatever right was retained under the usufructuary provision was abandoned, and we contend—in fact, all the German lawyers have agreed—that if it was a right in rem, it could not have been abandoned without a license, and therefore it was not abandoned, and therefore it continued. If, however—

The Court: I know your point.

2080 Mr. Burling: If, however, it was merely a right in personam—of course, our first point is that there was no such waiver, as a matter of fact; but assuming that we do not prevail on that; then there is a difference in the degree to which our expert is certain that the waiver required a license.

She is certain that if it was a right in rem, it required a license; but can only say that her best opinion is that if it was a right in personam, it required a license.

The Court: I do not think you quite get in mind—.

Mr. Boland: Your Honor—

The Court: I know what you are talking about.

Mr. Boland: I thought that the question that you asked was what effect did the foreign currency regulations have on the gift of October 5.

The Court: That is right. Here is what I am getting at. Suppose I wanted to make up my mind as between the doctor, who says that the right in rem was not created by the Stansfield draft, and the testimony of the present witness that one was; that the intention of the parties was that. She said that the intention of the parties plainly indicated that it was, the language indicates that it was, and so forth, and the doctor takes the contrary view.

Now, I know there are any number of other contentions, but suppose I have to make up my mind as between
2081 those two. What I would like to know is, Would one method accomplished, namely, the in personam sit-

nation or the future situation, effectuate this transfer, whereas the other one might not, insofar as the foreign exchange is concerned?

Mr. Burling: I think the question is entirely irrelevant until we get to the waiver point. Prior to that time I perceive no significance in the distinction.

The Court: In other words, it does not make any difference to you, prior to the waiver, whether this court would find that it was a right in rem or a right in personam?

Mr. Burling: An in rem right, I suppose, is a more intimate or higher degree of right and therefore places the enemy a little more clearly in possession of the property; but it is only when we get to that point—that is, when we get to the war between Germany and the United States—that the waiver comes in, first in point of time, but then the right also.

The Court: If you think it is entirely immaterial as between these two rights as of October 5, then I do not care to have any distinction made.

Mr. Burling: I think it will become material.

The Court: When you take into account the waiver.

Mr. Burling: When you get to the waiver point. Our contention is you could not waive either one without a license.

2082 The Court: Yes; I understand that.

Mr. Burling: If it is an in rem right, Your Honor has no problem in German law.

The Court: Wouldn't it be helpful for me to know what these people might have accomplished? One, if they created a right in rem; two, if they created only this expectancy or this in personam situation, bearing in mind their purpose?

In other words, it might become important, when we come to consider the waiver provisions, for me to know we all agree that this is in rem or in personam or in expectancy.

Mr. Burling: Yes, Your Honor.

The Court: Now, in determining that, we have one draft by Hachenburg, which your witness says plainly indicated an in rem. She also says the other one does, too; but the doctor takes a different view.

I suppose one of you could argue to me, Well, now, if this was purely an expectancy, then there would not be any chance whatever of a claim of violation of the foreign exchange; that that would not fall under the ban, whereas a right in rem would. Therefore, it was this expectancy and that only. Then, if you could persuade me that that had some real significance, you would come to your point of waiver later on.

Mr. Burling: I think Your Honor is asking me to make an argument—

2083 The Court: No, not an argument; I just wanted to ask you if you wanted to get any testimony on that. You can think it over. It is not absolutely essential. The thought occurred to me.

Do you know what I am talking about?

Mr. Boland: Yes, Your Honor; I think so.

The Court: I think you two gentlemen are making a rather major argument not only as to the waiver, because that will relate back to whether you have a right in rem or a right in personam or in expectancy—

Mr. Burling: If I may say so, I do not believe there is any testimony about expectancy.

The Court: When I say in expectancy, I probably used a loose term. I mean the right to bring into being a rem upon demand. That is what I mean. I was using a short word. That is what I meant.

Mr. Burling: Of course, our final contention in this line—our first contention being that it is a sham—is that if it is not a sham, the action did not instantaneously bring forth the right in rem, but that the right in rem arose when Frankenberg received the key to the box in Zurich.

The Court: I know that is your view, but I thought you also took the view—and I thought that was one of the cases you cited to me this morning—that, by the very language of this instrument, having had a dual purpose,
2084 that right in rem. I thought that was your German case this morning.

Mr. Burling: That was offered to rebut Dr. Kronstein's testimony that it would have been impossible for them to do it. One of our arguments—I regret the complexity it has—

The Court: I do not think it is so terribly complex. I think I follow your arguments. I think probably you do not get the picture I had in mind, and I do not know whether it is material or not. I have an entirely open mind on it.

Let me state to you what I have in mind. You certainly argued, and I certainly thought, whether it was by way of rebutting what the doctor said or not, as a result of the testimony, that you were going to argue that, under this decision of the German Supreme Court, which reversed the two lower courts, this instrument right on its face indicated a right in rem. Am I wrong about that?

Mr. Burling: I did not mean to go that far.

The Court: Didn't you? Well, I misunderstood you.

Mr. Boland: I did, too.

The Court: I thought the testimony was that, inasmuch as this created the right in Fritz von Opel, and, by the same token, reserved the usufruct, that would be treated as a dual transaction, which would completely make out a
2085 right in rem, without all of this rigmarole of so-called delivery, which would be true if you did it by separate instruments at separate times.

That is the way I understood that. I may be mistaken.

Mr. Burling: Quite candidly, Your Honor, I would read that case the same way. I am unable to make the argument because Miss Schoch tells me that that is not what it said.

The Court: Maybe I had better get cleared up on that right now.

Mr. Boland: I think you had better. I got that same impression.

The Court: I certainly got that impression. I thought it was a very strong point in your favor if it decided that. Maybe I had better get that clear.

By the Court:

Q. Do you understand me? A. Yes, I do, Your Honor.

Q. Tell me where I am wrong on what you said. A. Under a gift agreement, which is Exhibit 5, the usufruct did not come into being because the reassignment of this delivery was not put in, was omitted.

Q. Yes. I understood that. That is where I got that conclusion of yesterday. A. That is the conclusion which I came to at the beginning. I may have confused you by analyzing the decision of this morning.

2086 The decision of this morning I think was submitted merely to show that a statement which I think Dr. Kronstein made, to the effect that a gift with a reserve usufruct cannot have been made in such way that you make the gift and at the same time the usufruct comes into being—provided of course, that all the requirements of the law are met—but that such a gift can only be defined as a gift with a charge; under German law, which means, first, the gift has to be made and full title transferred, and then there is an obligation on the part of the donee to perform certain obligations which the donor imposed upon him, and the donor, after the gift has been made, made demand that the obligation of the donee be fulfilled. In other words, you have the gift as the main purpose of the transaction.

Q. But that demand has to be made or the assignment has to be made before it comes into being? A. Yes.

The Court: I have that down. I misunderstood you.

Mr. Gallagher: Since we are trying to clear up this problem, Dr. Kronstein would like to clear it up.

The Court: I will let you do it when he comes back on the stand. I think I have it now. I am glad I brought it up, because I had a different impression.

By the Court:

Q. You still have to have what you describe as a
2087 delivery, which might be by assignment or by actual turnover? You still have to have that, and you did not have it in this case? A. That is right, at the time these requirements were made.

The Court: That has helped me. I am glad I have that straight, because I did not understand it that way.

Mr. Burling: May I state why I offered the case?

The Court: Yes. I think I have why you offered it, but you may state it again.

Mr. Burling: I offered it to rebut what I thought was the testimony that you could not do it. One hypothesis is what Miss Schoch testified she would think from just seeing the instrument itself—that the lawyers intended to do this but made a highly technical error, and by that error they caused the whole thing to fail. I offered the case, which says you can under some circumstances do it, to show that they might have reasonably tried to do it.

The Court: I follow you all the way around, then. Your idea is that you agree that this instrument on its face, without any subsequent act whatever, would not create a right in rem as of that time, but that there came a time later on—

Mr. Burling: It either failed totally—

The Court: It either failed totally, because one
2088 of the material provisions failed, or it did not create a right in rem at that time, but that later on,

when he delivered to Frankenberg, his agent, it did come into effect as a right in rem?

Mr. Burling: And that on its face it discloses an intention to disclose either an instant right in rem or an intention that one be created in the near future, rather than leaving the right in the remote future.

The Court: I understand.

In view of that position, that would make my inquiry material. I agree with that. I am very glad that that is straightened out, because I had an entirely different impression. In fact, I had a note of it, because I wanted to ask the doctor about it. I thought you found a case overruling those lower courts, which made it appear that you could create the in rem by this very instrument itself. Now I see that that is not so.

Mr. Burling: You could have.

The Court: You could have done it, but, through some technical point here, they did not, because they did not use the language in advance. I have that straight. I am glad I have it straight, because I was wrong on it.

Mr. Boland: May I thank Your Honor, because I got the same impression.

The Court: As I told you, I will have to stop in
2089 ten minutes. Have you something brief you can ask her about now?

Mr. Boland: I have several things.

The Court: Brief, I mean. I have to stop in ten minutes. You go ahead.

By Mr. Boland:

Q. Miss Schoch, yesterday you testified, on pages 1985 to 1987 that a devisen auslander in October of 1931 having property located in Germany and property located outside of Germany could not have become a devisen auslander without losing his property in Germany. If that is not true, I would like to be corrected.

Mr. Burling: I think the reporter missed a German word. I remember my question very vividly. It was a devisen inlander in October.

Mr. Boland: Pardon me. I am sure that is right.

Mr. Burling: Thank you.

By Mr. Boland:

Q. And I think that the facts were closely related to those of Wilhelm von Opel and Fritz von Opel, Wilhelm being the devisen inlander and Fritz being the devisen auslander, and the amounts of money, I think, in evaluating the property were closely related to the value within Germany and the value of the shares that were in New York.

Now, did I gather from your testimony that Wil-
2090 helm von Opel under such circumstances could not have left Germany in October of 1931 without having lost all of his property in Germany? A. I think that is not what I said. He could have left Germany, and upon leaving Germany he would have become an auslander for the purposes of foreign exchange control, but he would not have been able, before leaving Germany, to transfer the bulk of his German property abroad. He would have, under a license, been enabled to transfer some of it.

Q. You testified to a limited amount, I think you mentioned. A. Well, there was a limited amount which he could freely take out of Germany on the passport.

Q. I got a general impression from your testimony yesterday, and I think Mr. Burling's adroitness was used in creating an impression, that Wilhelm von Opel could not have left Germany in October of 1931 without losing all of his property within Germany and leaving thereby the inference that he was giving it to Fritz as an alternative.

Now, I want to ask you whether, under the circumstances which I have given you, Wilhelm von Opel could

not have left Germany without losing his property in Germany and without losing his property in New York. A. Naturally, he could not lose his property in New York.

2091 Q. That is right. That is taken for granted. He has got that one way or the other. A. That is outside the reach of the German Government.

Q. Let us take the German property. What would have happened in 1931 to Wilhelm von Opel if he wanted to become a devisen auslander? Could he, first, become a devisen auslander? A. He could.

Q. He could? A. He could.

Q. What were the steps necessary to become one? A. He would have to hand in an inventory of his German property. He would have had to obtain clearance from the tax authorities. He would have to submit evidence that he intended to acquire a foreign residence and various other—

The Court: Mr. Boland, I did not get the impression that you got.

Mr. Boland: Your Honor, I reread the record last night.

The Court: Let me state to you the impression I got, and it may save you some time. I understood her to say that if he had disposed of a huge part of his estate to an auslander in violation of the exchange rules and left that country, they would penalize him by grabbing what he had then.

Mr. Boland: I think the record will show quite clearly—

2092 By the Court:

Q. Isn't that right? A. I think the assumption was that he had not foreign properties which were subject to the duty to tender to the Reichsbank.

Q. That is right. He had violated the decree, or some-

thing. A. No. The German securities located in New York were not subject at that time to such duties.

Q. I understand that. He could give them away? A. He could give them away.

Q. But if there came a time when it became his duty to report them and he did not report them and then left the country, then they would penalize him by taking what he had left there? A. Yes. That was my understanding that that was what I testified to.

Mr. Boland: May I recheck this, your Honor? My impression was otherwise.

The Court: Go ahead and ask your questions. I thought I could save you that trouble, because that was not the impression I had. Go ahead and ask you whatever you want on that.

By Mr. Boland;

Q. Well, my main point is that in October of 1931
2093 Wilhelm von Opel could have left Germany and become a devisen auslander? A. That is right.

Q. No. 1? Couldn't he? A. Yes.

Mr. Burling: Will you state whether this is before or after the sale?

Mr. Boland: This is on October 5, 1931.

By Mr. Boland:

Q. That he could have left? A. Yes.

Q. And that his property in Germany could not have been confiscated or subjected to anything other than normal taxes? A. Yes.

Mr. Boland: That is the only point I have, Your Honor, without going into an elaborate discussion of our other points.

The Court: Very well. We will adjourn until tomorrow morning.

(At 12:55 p. m. an adjournment was taken until Thursday, January 6, 1949, at 10 a. m.)

2097 PROCEEDINGS

Thereupon MAGDALENA SCHOCH resumed the stand and testified further as follows:

Cross Examination (resumed)

By Mr. Boland:

Q. Miss Schoch, I show you Defendant's Exhibit 115, which was identified and introduced, I believe, yesterday. Do you consider that an authority on German law (handing a document to the witness)? A. Yes, I do.

Q. Do you consider it a high authority? A. I would not say a high authority, but I would consider it a correct compilation and analysis of cases dealing with sham transactions.

Q. What dignity would you give it by way of comparison in American law? A. Well, that is hard to tell. I would consider it a useful compilation, with a brief statement as to what the courts decided in these cases that are compiled in the book.

Q. Yesterday, in discussing usufruct, the question arose about joint possession. Now it is clear in your mind,
2098 is it not, that joint possession is necessary in order to establish a usufruct as a right in rem? A. Under German law, yes.

Q. And that the usufruct remains in being, so to speak, only as long as the joint possession is present, is that right? A. Yes.

Q. No question about that under German law? A. No.

Q. Now, Miss Schoch, yesterday you testified, at page 2023 of the record and 2024, as follows, in answer to Mr. Burling's question:

"Question: Did you hear Professor Kronstein testify to the general effect that under German law it is difficult or impossible to make a gift reserving then and there a usufruct, and that the most that can be done is to make a gift subject merely to a charge?

"Answer: That is what I understood from his testimony"?

Do you recall that? A. Yes.

Q. And having testified in respect of a Supreme Court decision which you had with you, the following question was asked, on page 2028:

"Question: Before I go on to a different topic, it
2099 is clear, is it not, that it would have been possible for the parents Opel to have given the 600 Opel shares to Fritz von Opel burdened by a usufruct which came into existence simultaneously and instantaneously?"

Your answer:

"Yes; in my opinion, that would have been possible.

"Question: That is what the Supreme Court of Germany held in the case we have just discussed?"

Your answer is, "Yes."

Then, on page 2086 you testified as follows:

"The decision of this morning I think was submitted merely to show that a statement which I think Dr. Kronstein made, to the effect that a gift with a reserve usufruct cannot have been made in such way that you make the gift and at the same time the usufruct comes into being."

Do you recall that? A. Yes.

Q. And the entire purpose, as I understand your testimony, was to bring the Supreme Court decision to the attention of the Court for the purpose of discrediting Dr. Kronstein?

Mr. Burling: If your Honor please, I submit the purpose of the testimony is a matter which is determined
2100 by counsel and not the witness.

By Mr. Boland:

Q. Let me ask you the question: What was the purpose of bringing in the decision?

Mr. Burling: That is a matter within my brain, and not the witness'.

The Court: That is probably true. I guess maybe I can draw that inference, or else he could argue it.

Mr. Burling: I may have been inarticulate, Your Honor, but I did my best to state what the purpose was yesterday, and I am the only person who knows why I asked the question which I did ask.

The Court: You may ask her what her point was in bringing that case out.

By Mr. Boland:

Q. What was your point in discussing the case or bringing out the case? A. My point was to answer Mr. Burling's question.

Q. Now, had you read the record concerning Dr. Kronstein's testimony before coming in to testify? A. Yes, I had read part of the record.

Q. Did you read page 408? A. I do not know what is on that page. Would you mind showing it to me?

Q. Let me read it to you. On page 408 I asked
2101 the following question:

"Doctor, you have practiced in Germany for quite some time; would you explain to the Court what language

could be inserted in this gift agreement"—referring to Plaintiff's Exhibit 5—"in order to establish an immediate right in rem.

"Answer: All that would have to be done is to add one part, in which you say:

"'I, Fritz von Opel, herewith reassign—or assign—my claim against the depository of shares in New York to the Opel parents, with the understanding that it shall be a joint claim of the Opel parents and myself.'"

Then on page 409, continuing:

"And by this act Fritz von Opel would have to take out the shares under the name of the three; it would have been provided that he had to take these shares and put them in New York into a bank under the name of Fritz von Opel, Wilhelm von Opel, and Marta von Opel; or he could give it to the bank to keep it there, with instructions to keep it under the name of the three, and pay out exactly as it provided here. That is all that is necessary.

"Question: So that if the parties had intended the
2102 establishment of the immediate right in rem, it would have been a very simple thing, under German law?

"Answer: Very simple.

"Question: And it could have been done under this instrument itself?

"Answer: It could have been done, if the assignment was not made just as an outright assignment, but with the idea that it is reassigned to all three, it was already clearly an established right in rem."

Had you read that portion of Dr. Kronstein's testimony? A. I remember that portion, yes.

Q. Are you still of the opinion that Dr. Kronstein testified that you cannot establish a right in rem in a single instrument such as our gift agreement? A. The part of the record in which he said that a gift with a usufruct

reserve can only be a gift subject to a charge appears contradictory to this statement.

Q. You do agree that he made that statement? Do you deny that that is correct? A. I agree that he made the statement, certainly.

Q. And you do agree that he testified not on an abstract situation, but in respect of this gift agreement, Plaintiff's Exhibit 5; that he testified that an immediate
2103 right in rem could have been established with this gift agreement; is that right? A. He did, yes.

Q. And does the Supreme Court decision of Germany bolster that position? Does it sustain his position? A. Yes, it does.

Q. Therefore the case is brought in support of Dr. Kronstein, where it serves no purpose, is that right? A. I think it serves another purpose, too.

Mr. Burling: I again object to counsel's arguing with the witness. I will be glad to argue with counsel, and I say that Dr. Kronstein testified two different ways; but my purpose in asking an expert witness to testify is a matter which is certainly not appropriate for inquiry of the witness.

The Court: Well, both sides resorted to the practice of directing attention to Dr. Kronstein's testimony by name. I think the way to do it is to bring out what the law is. Whether it contradicts him or not, I will decide. I think it is cleared up.

Mr. Boland: That is the last question I have of that nature, Your Honor. I think it is.

By Mr. Boland:

Q. Now, Miss Schoch, it is your testimony that the mere use of the word "niessbrauch" in an instrument re-
2104 quires an interpretation of an immediate right in rem, under the German Civil Code? A. That is not my testimony.

Q. It is not? A. No.

Q. Would you explain what significance the word "niessbrauch" has in an instrument? A. The word "niessbrauch" has a technical significance. The word "niessbrauch" if used by a lawyer certainly requires the interpretation in the sense of an in rem right, unless there is strong indication to the contrary.

Q. Do you distinguish in your own mind, in using "in rem right," between an in rem right which may come into being in the future or one that comes into being immediately? Is there a distinction between the two things? A. No. An in rem right is a right which is either created now or which may be created in the future, depending on your agreement.

Q. Depending on the agreement, and in referring to Plaintiff's Exhibit 5 and in viewing the word "niessbrauch" in that instrument, it is your interpretation that the intent of the parties was that an immediate right in rem be established; is that true? A. That is my interpretation from looking at this document alone.

2105

Q. Now, if in fact an immediate right in rem, or, let us say, the institution of the usufruct, had not been created on October 5, assuming the contract dated and made on that date—that if the right in rem did not in fact become established on that date—it is your testimony that the contract is void; is that right? A. The contract is void if the right in rem formed an essential part of the gift and if the gift had not been made without the immediate creation of the right in rem.

Q. Now, directing your attention to page 1 of the gift agreement, you heard Dr. Kronstein testify that on the first page there were in effect two contracts; one was an obligatorischer vertrag and the other a dinglicher vertrag; one in effect the obligation created between the parties and the other the act of transfer; is that right? A. Yes.

Q. And you do agree that, under German law, under the concept of German law, there are in effect two contracts

on the first page? A. Well, I do not quite agree in this way of looking at the thing, but I agree with his conclusion that on page 1, if you look at nothing but on page 1, there was a valid gift.

2106 Q. Is it your testimony that there are not in effect two contracts? A. No; in my opinion, there is just one contract. My opinion is it is a present gift.

Q. Let us put it this way. The words "that I desire to give to you" and the words of acceptance would create what is known in German law as an obligatorischer vertrag; is that right? A. That is right, yes.

Q. And the so-called dinglicher vertrag were the words of actual conveyance, the act of transferring, with intent to pass title? You say that is not a dinglicher vertrag? A. Yes, it is, but, in my opinion—

Q. Does the word "vertrag" mean contract in German? A. Yes.

Mr. Burling: If your Honor please, we are construing one page of a three-page contract.

Mr. Boland: I am going through it page by page, Mr. Burling; and, if you will just bear with me, I will cover it.

Mr. Burling: If I may just say this, it does seem to me a waste of the Court's time to construe what you would read from page 1 when there are in fact three pages.

The Court: Of course, that is your argument. His
2107 is the other. I will give him a chance to bring it out.

Mr. Boland: I think it is important if there is a disagreement between what we testified to.

The Court: Go ahead. I will hear you gentlemen on it at a later time.

By Mr. Boland:

Q. Now, directing your attention to page 2, the first paragraph on page 2, that relates to the usufruct; right? A. Yes.

Q. Now, that, under German law, would be realizing that

the contract is signed by both parties; would be an obligatorischer vertrag; is that right? A. If it was intended as such.

Q. Yes. So that the only thing that is missing is another dinglicher vertrag, a reconveyance into joint-possession; is that right? A. Yes.

Q. And it is your testimony that of these four possible contracts, three of which have been set out in the gift agreement, that the dinglicher on the usufruct, not having been made, invalidates the whole thing; everything is void? Is that right? A. I said it could invalidate—

2108 Q. Oh, it could? A. —provided that the Court found that the gift would not have been made without the immediate establishment of the usufruct by delivery of possession; that that would be a question of fact for the Court to decide.

Q. And you say that if the intent of the donor was that he would not have made the gift—but for the establishment of an immediate right in rem, that he would not have made the gift—then under such circumstances it would be void? A. Yes.

Q. But, anything less than that, it would not be void? Is that your testimony? A. If as a matter of fact—

Q. Suppose he considered it important—

Mr. Burling: May the witness finish? She started to say, "If as a matter of fact," and I would like to hear the answer.

Mr. Boland: I will bring that out.

Mr. Burling: I would like to hear the answer.

The Court: Let her answer as far as she went and then let her finish.

By Mr. Boland:

Q. Go ahead. A. If as a matter of fact the Court found that what the donor intended and all he wanted was

2109 a promise to establish a usufruct in the future, then the non-delivery of possession—that is the establish-

ment of the right in rem immediately, presently—would not render the gift void.

Q. Does the German Civil Code specifically set forth the cases in which contracts are void? A. Yes, it does, and it has a specific provision concerning nullity of an entire transaction which is composed of several transactions if one of the composing transactions is void.

Q. What is the section? 117? That is sham, is it not? A. 139.

Q. 139? A. 139 of the Civil Code.

Q. In preparing your testimony did you make a study of any cases giving a practical application to this rule? A. Yes, I did.

Q. And it is your opinion that the gift contract in and of itself is clear and unambiguous that what the parties intended was an immediate right in rem? That is right, isn't it? A. Reading just the—

Q. Just the gift agreement, Plaintiff's Exhibit 5. A. Yes.

2110 Q. Now, I have a series of hypothetical cases which I would like to ask you. They are designed to find out whether or not in the case of an essential element which is lacking but intended the contracts are valid or void, and if the hypothetical is not clear to you, please ask questions.

Assume that A makes a contract with B, a contract of sale of real property, and assume that the contract of sale is notarized, and I take it under German law that binds the obligatorischer vertrag— A. That is right.

Q. —assume that for some unknown reason the act of conveyance is omitted, but the parties intend an immediate act of conveyance. Is this contract void under German law? A. I am not quite clear on the facts. The parties make a valid contract of sale?

Q. Well, I am asking you whether the contract is valid A. I mean, in valid form, notarized form?

Q. Notarized form. A. Notarized form.

Q. With the intent that the act of conveyance take effect immediately, and for some unknown reason the act of conveyance is omitted. Is the contract void?

2111 A. Not necessarily.

Q. Not necessarily? A. Because, again, this is a question of fact whether one is an essential element of the other or whether you have two transactions which are separate and independent of each other.

Q. Well, the intent was that they be combined into one, and you will agree that if I am to buy property from you and that if you give me a deed and the deed has not been registered with the Register of Wills, without which the act of conveyance does not take effect, that I consider transfer of title pretty important when I buy your real estate? You will agree to that?

Mr. Burling: I object to this line of questioning on the ground that the witness is testifying it is a matter of fact to the German court. The German law, I believe the testimony is—and I do not believe my friend will contest this—is that if there are two elements and each element is an essential element of the transaction, then the failure of one will cause the failure of the whole thing. If it is not an essential element, it won't.

The Court: I think you may go into cross examination of her, but I do not know why you go into real estate.

2112 Mr. Boland: This series of hypothetical cases will build up gradually to our case, Your Honor.

The Court: I know, but I do not know whether I should permit questions about real estate over objection of counsel. A rule on real estate might be quite different.

Mr. Burling: My point is that what counsel is in effect asking it what decisions of fact German courts have come to on the basis of a lot of evidence which we do not have here.

The Court: I will permit her to make that point, if that is the only objection. She can say she is not able to tell what the German law is until the Court has the facts. She can answer. The only point I had in mind is that I do not know if real estate helps us much.

Mr. Boland: The theory, of course, is that the act of conveyance is the establishment of a right in rem.

The Court: I know that, but you are talking about personal property here.

Mr. Boland: I have cases on personal property.

The Court: That is the one I think we should have.

Mr. Burling: My point is that what is being asked is what German courts have decided the facts were on the basis of evidence. It is like a negligence case—

The Court: That again is for the witness to say. She might very well say that on the facts that are
2113 assumed here, the answer is so and so. If she says otherwise, it will depend on what the German courts find on the facts, that answers the question.

Mr. Burling: Yes, Your Honor.

By Mr. Boland:

Q. Instead of real estate, let us go to a matter of personal property. Let us assume that A agrees to lend a sum of money, 50,000 marks, to B, which loan is to be secured by a mortgage or secured by stock. The word, as I understand it, is "hypothek."

You will have to bear with me on the pronunciation of these German words, Your Honor. It is difficult for an Irishman to get them across.

Let us assume that A agrees to lend 50,000 marks and that B agrees to secure the loan with the collateral of stock. Now, assume that A actually gives him 50,000 marks and that for some unknown reason the mortgage has not been established. Is that contract void under German law? We will assume, I believe, the additional element

that it is very important for A— A. The loan has actually been made?

Q. The agreement is, "I agree to lend you 50,000 marks, but at the same time I would like to have a mortgage in respect to shares of stock," and we will assume that the mortgage securing the loan is very important for me. However, I give you the 50,000 marks and for some unknown reason on the present state of facts, the mortgage has not been established. Under German law, is that contract void? 2114

Mr. Burling: It depends on what the agreement is. Does counsel mean that there is an obligation to repay the 50,000 marks or what? I do not understand.

Mr. Boland: I think the witness, if she does not understand the question, can say so.

The Court: I have some difficulty, Mr. Boland. I will give you the same protection Mr. Burling had in questioning the Doctor.

As I understand it, questions put to an expert, in order to be apropos, must be founded upon some evidence in the record, unless you are trying to test her qualifications. What we are interested in is not mortgages, not real estate, or delivery of them. As I understand it, these experts are just as you and I if testifying across the way on questions about tax laws. We have studied it for a long time. It might be that if we go over there we might be asked questions on real estate. The Supreme Court has decided any number of cases. I do not know whether that would be the way to do it.

Mr. Boland: Under the German Code this word "hypothek," which is the counterpart of the word "mortgage," is defined as a limited right in rem. It is an institution known in German law in the same fashion as is a niessbrauch. That is defined as a limited right in rem; and the use of the word "hypothek", under German law, in hypotheticals such as I have given, would 2115

have the same effect and be bound by provisions of Section 139 about essential elements wanting voiding the contract; and the purpose of this line of questioning is that if she agrees that in such instances the contracts are not void, I would like to then ask her how she distinguishes using hypothek, which is a technical institution in German law, in one sense and niessbrauch, which is a counterpart of a limited right in rem, in a different sense.

Mr. Burling: My objection is that there is an ambiguity in counsel's question. I do not understand whether he means that there is an obligation once he, in his hypothetical case, has paid the 50,000 dollars, on the part of the borrower to return it or, on the contrary, what other contract or obligation he is talking about. I think he is asking an ambiguous question.

The Court: I think the witness, if she has any difficulty with any of the assumptions, should be at liberty to say so.

Mr. Boland: That is one of the questions I asked.

The Court: I do not know whether I have quite
2116 gotten your point or not. I would like to follow you, because I would like it to be intelligible to me as you go along.

Now, you say there is a term used in this—What is the section? 139?

Mr. Boland: The section on hypothek is 1113 of the German Civil Code.

The Court: What does that word "hypothek" mean?

Mr. Boland: I can't define it myself.

The Court: What does it mean?

The Witness: Well, it is the equivalent of a mortgage. It gives a right in rem in the property—that is, the right to satisfy—

The Court: A mortgage. Is this section that you are referring to one that is used by the witness in connection with this case in any wise?

Mr. Boland: The witness has not used it in her direct case, no, Your Honor.

The Court: What I am trying to get at is the significance of the delivery in the case of a mortgage in comparison to the significance of the delivery in the case of a usufruct.

Mr. Boland: The whole purport or import of her testimony, as I gather it, is that niessbrauch is defined as a limited right in rem under the German Civil Code.
2117 Consequently, if the word is used by parties to any kind of a contract, what they mean was exactly what is defined in the German Civil Code.

The Court: I did not quite get that point of hers. I thought she said that if, from a reading of the instrument, the niessbrauch provisions obviously were conditioned upon the efficiency of the instrument, then the whole thing fell. I would think that would be our law. If, from the reading of the entire instrument, you have a provision which is defectively stated, whereas it is absolutely obvious to the reader of the instrument that that was an essential provision, then over here the whole thing falls, if that is what she is saying.

Then she says, if, on the other hand, you would read this instrument and that might be created in the future, then it would not fall. I think that is what she said.

Now, if there is any difference in the German and ours—I think that is our law, is it not?

Mr. Boland: I think that our law is that if you have got a gift agreement—and I am sure that this is the only way in which the German law can be interpreted—that if the sine qua non of the gift is an immediate right in rem, it is established immediately; and if it is not established immediately, the donor would not have intended the gift.
2118 I think it is clear. We will agree on that. We stipulate that.

Mr. Burling: All parties are agreed on that. I agree

with Your Honor on the statement of the German law and our law.

The Court: I think he agrees to that.

Mr. Boland: Yes.

Mr. Burling: I do not think there is any controversy on that.

The Court: I do not think there is any controversy on that.

Mr. Boland: I have been trying to get out of her this. These are designed to show how far from that you can get before you find that the contract is not void. Now, — the testimony of the father, Wilhelm—

The Court: It has to amount to an essential element without which the instrument would not hold. She has studied comparative law. Ask Dr. Kronstein, if he comes back, if it differs from our law in any regard in that respect. I think the law is pretty plain here.

If I make a gift that is obviously, from the reading of the words, conditioned upon a certain provision, and due to some technicality or some other act of delivery, it is ineffective, it is no good. We all agree to that. I think you said you agreed to that.

2119 On the other hand, if it says it is to be created in the future, then it is not invalid.

In the third place, if it does not depend upon the creation of this niessbrauch, then it has no effect; it is immaterial. I think we are all agreed on it. I am not sure.

Mr. Boland: Well, these cases, as I understand under German law, and I would like to bring this out through this witness, indicate that if the parties indicated an immediate right in rem, such as this hypothek, and for different reasons which are set up in hypotheticals—first, an unknown reason; secondly, they protect us; and, third, there was a kind of an understanding that they could take care of it later—but in the first case they intended it—and let us assume that it did not happen and the reason is not known, under German law, as I